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January 8, 2015

By email and U.S. mail

Jeff S. Jordan
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: RR 14L-34

Dear Mr. Jordan:

In reviewing my December 24, 2014 letter, it appears that the first full paragraph on page 5, concerning the Commission's legal guidance regarding in-kind reporting, omitted a passage. Workers' Voice respectfully requests that the Commission accept the attached revised version of my letter so that passage is included. The letter is otherwise unchanged.

Thank you for your consideration.

Yours truly,



Laurence E. Gold
Counsel to Workers' Voice

Cc: Elizabeth H. Shuler, Treasurer

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December 24, 2014

Jeff S. Jordan
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: RR 14L-34
Workers' Voice

Dear Mr. Jordan:

I am responding on behalf of Workers' Voice to your letter and enclosure dated October 7, 2014 ("the Referral Letter") regarding the internal referral of this matter from the Reports Analysis Division ("RAD") to the Office of General Counsel ("OGC") for possible enforcement action under 52 U.S.C. § 30109 concerning Workers' Voice's compliance with 52 U.S.C. § 30104(g) during the 2012 general election period. Workers' Voice appreciates the opportunity to respond, as well as the additional time accorded for that response due to the recent national election and other intervening matters involving counsel and compliance personnel who provided services to Workers' Voice during and since 2012. Workers' Voice has undertaken a more complete review of the reporting that is at issue and respectfully suggests that this matter can and should be resolved now either by the Alternative Dispute Resolution Office ("ADR Office") or by OGC through pre-probable cause conciliation.

We acknowledge and explain below in detail the nature and reasons for the failure of Workers' Voice to timely file some 48-hour and 24-hour Schedule E independent-expenditure reports during the 2012 general election period. As we explain, these failures were unintended and resulted from the extent and novelty of a multi-state voter-contact program that primarily relied on the receipt and deployment of millions of dollars' worth of contributed in-kind resources from many different sources, a rare and possibly unprecedented undertaking by any political committee; and, there was a design flaw in a vendor's generation of the Schedule E.

supplemented by some telephone banking. Workers' Voice reported those in-kind resources both as *receipts from* those contributors and as *in-kind independent expenditures to* those contributors. In total, Workers' Voice's in-kind independent expenditures during the 2012 general election amounted to \$4,870,977.92, and its total independent expenditures during that period were \$6,336,229.16.

The Referral Letter concerns late reporting of 8.35% of those total independent expenditures; and, the amount at issue that was not reported to the Commission at *any time* before the November 6, 2012 general election comprised *just one-half of 1%* of those independent expenditures.

B. How Workers' Voice Reported Its In-kind Transactions in 2012

During 2012, Workers' Voice set out to report its in-kind contributions received and independent expenditures made as best it understood how to do so given the limited and conflicting legal guidance available, as described below, and the novelty of the arrangements that characterized its voter contact program. Workers' Voice matched every in-kind contribution received with a corresponding Workers' Voice expenditure, which was often, but not always, an independent expenditure. In order that Workers' Voice's Forms 3X would balance, Workers' Voice attributed these in-kind expenditures *to its in-kind contributing source* although, of course, that source did not actually receive anything.

Every day during the general-election period, Workers' Voice timely reported every in-kind independent expenditure about which it then had information. Workers' Voice attributed to particular independent-expenditure communications the value of the in-kind personnel and other resources that were used for that expenditure, using the figures provided to Workers' Voice by its in-kind contributors. Workers' Voice then credited these in-kind values to the respective dates when they were deployed, according to its daily tracking, in order to disseminate Workers' Voice's independent-expenditure communications or other activities.

Workers' Voice devised a system to account for these in-kind receipts and to associate them with Workers' Voice independent expenditures and other activities, and Workers' Voice worked closely with each of its in-kind contributors to amass the requisite in-kind contribution information from them in a timely manner. This system, and Workers' Voice's overall method of operation, entailed the absorption of considerable in-kind resources in multiple states and elections, and sometimes accurate information was conveyed to Workers' Voice too late to register in the appropriate 48-hour or 24-hour report.

From September 7 until November 5, 2012, Workers' Voice filed at least one 48-hour report or 24-hour report *every single day*, and it sought to report all of its independent expenditures as quickly and simply as possible. Workers' Voice realized during September and October 2012 that it was belatedly receiving data from its in-kind contributors about some of its

independent expenditures. Initially, it sought to keep up with the new data by filing amended 48-hour reports: between October 15 and 18 it filed no fewer than 30 amended 48-hour reports, containing information dating back to September 7. But this task proved both overwhelming and inefficient in the face of the daily ongoing data and reporting demands, so Workers' Voice instead resolved to include on its periodic reports all late-received information (whether requiring additions or, in many cases, deletions of expenditures that had been reported on 48-hour and 24-hour reports), and it did so – including, as it turned out, via three amendments of the original timely October Report, two amendments of the original timely Pre-General Report, and two amendments of the original timely Post-General Report, none of which significantly altered the information on the original periodic reports.¹

However, Workers' Voice did not realize that its vendor's system for generating 48-hour and 24-hour reports for a particular election did not result in listing on the reports the expenditures that *preceded* the initial *attainment* of the \$10,000 and \$1,000 thresholds; instead, the reports listed only the expenditures that crossed and exceeded them. So, for each election, there was a reporting gap whenever it took more than one day for Workers' Voice to reach that initial threshold – and up to two such gaps per election, one for the initial \$10,000 threshold and one for the initial subsequent \$1,000 threshold. (Most of the actual gaps pertained to the \$10,000 threshold.) On the other hand, once either threshold *was* reached in a particular election for the first time, *it was not re-set again*, meaning that further expenditures in that election subject to that threshold were reported daily without regard to whether they yet aggregately reached that threshold again. That system resulted, then, in *more rapid* reporting to the public of many Workers' Voice independent expenditures than would have occurred if attaining these subsequent thresholds first triggered new reporting.

C. Limited and Conflicting Legal Guidance for In-Kind Reporting

Although Workers' Voice understood in 2012 that it should report both the in-kind contributions it received, and the same receipts as corresponding and balancing in-kind expenditures, it did so without the benefit of clear legal guidelines. No provision of the Act directly addresses this in-kind reporting obligation, and there is little in the Commission's regulations and other sources of authority and compliance information about how, specifically, to account for and report in-kind expenditures. The applicable regulation, 11 C.F.R. § 104.13(a)(2), simply states that an in-kind contribution received also “shall be reported as an expenditure... on the appropriate expenditure schedule, in accordance with 11 CFR 104.3(b),” which covers all disbursements, including independent expenditures. The few advisory opinions that refer to this requirement fail to illuminate it – see AOs 2007-22, 2004-36, 1990-09, 1986-02 – and we do not

¹ As the Referral Letter relates (on unnumbered page 7), in conversations with RAD about RAD's requests for additional information during 2013 that preceded the current referral, RAD advised Workers' Voice that it did not request that Workers' Voice further amend its 48-hour and 24-hour reports that were submitted during 2012 (although Workers' Voice was prepared to do so).

find any Commission enforcement case that does so.

Meanwhile, the Commission's *Campaign Guide for Nonconnected Committees*, at p. 58, says that "the value of the in-kind contribution must be reported as an operating expense on Line 21(b) (in order to avoid inflating the cash-on-hand amount). 104.13(a)(2)" (emphasis added). See also FEC, *Campaign Guide for Corporations and Labor Organizations*, p. 55 (same); FEC, *Campaign Guide for Political Party Committees*, p. 81 (same). The Commission's Form 3X instructions twice direct the same thing. "Each contribution in-kind [that is received] must also be reported in the same manner as an operating expense on Schedule B and included in the total for 'Operating Expenditures.'" Instructions for Form 3X and Related Schedules, p. 10. And:

Contributions in-kind received by the committee which are itemized on Schedule A must also be itemized as an operating expenditure on Schedule B. In addition, in the "Purpose of Disbursement" box include the notation "Contribution In-Kind," and the nature of the expenditure (e.g., consulting, polling, etc.).

Id., p. 13.

There is, then, some dissonance between the Commission's public guidance here and its regulations: Line 21(b) is used only to report operating expenditures, not independent expenditures, so if in-kind expenditures need only be reported on Line 21(b), then Workers' Voice had no obligation to report them on Schedule E.

3. The Findings in the Referral Letter

A. The Reporting Omissions in Context of Workers' Voice's Total Independent Expenditure Reporting

Of the \$528,976.23 at issue here, \$428,903.80 comprised in-kind expenditures, which amounted to 8.8% of Workers' Voice's total \$4,870,977.92 of in-kind independent expenditures (which matched an equal number of in-kind contributions received) from September 7 through November 6, 2012. Notably, in no case did Workers' Voice's rapid-reporting omissions deprive the general public of knowledge *before* Election Day, November 6, that Workers' Voice was undertaking independent expenditures in a particular election. Nor was the public deprived before Election Day of knowing the identities of the in-kind contributors to Workers' Voice (who were also the recipients of the corresponding in-kind expenditures).

Moreover, accepting the Referral Letter figures (so, not adjusting for the expenditures to vendors that we explain below *were* timely reported), 8.35% of Workers' Voice's *total* independent expenditures (both in-kind and monetary) in the 2012 general election period were

untimely reported; 91.65% were timely reported. *And, 99.44% of all Workers' Voice independent expenditures – \$6,300,839.11 – were publicly reported before Election Day; just 0.0559% – \$35,390.05 – were not.* Here is a summary:

<u>Periodic Report</u>	<u>Total Independent Expenditures</u>	<u>Amount Without a 48-hr/24-hr Schedule E</u>	<u>Portion Without a 48-hr/24-hr Schedule E</u>
October Quarterly	\$1,096,610.05	\$ 92,629.23	8.45%
Pre-General	1,859,889.53	400,956.94	21.6%
Post-General	3,379,729.58	35,390.05	10.4%
	<u>\$6,336,229.16</u>	<u>\$528,976.22</u>	<u>8.35%</u>

B. The Findings Concerning Missing "Reports"

The Referral Letter asserts that Workers' Voice failed to file certain numbers of special Schedule E reports for certain numbers of independent expenditures that Workers' Voice subsequently reported on periodic reports, as follows:

<u>Reports</u>	<u>Independent Expenditures</u>	<u>Periodic Report</u>
230 48-hour reports	460, totaling \$92,629.23	October Quarterly
724 48-hour reports	1,466, totaling \$400,956.94	12-Day Pre-General
11 24-hour reports	21, totaling \$35,390.06	30-Day Post-General
<u>Totals:</u>	<u>965 reports</u>	<u>1,947, totaling \$528,976.23</u>

Workers' Voice has reviewed the Commission's Attachment B ("Att. B") to the Referral Letter and acknowledges that (with several exceptions explained below) the attachment lists independent expenditures that were not timely reported on 48-hour and 24-hour reports. However, the Referral Letter mischaracterizes the number of "reports" that Workers' Voice failed to file.

Although the Referral Letter does not explain its calculations, it appears to count as a distinct "report" each page of a Schedule E form. That seems quite wrong; instead, each page provides space to list two independent expenditures, which may or may not even concern the

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same election – that is, a distinct Senate, House or presidential contest scheduled for an election date. If on a particular date a committee is obligated to report, say, 10 different independent expenditures in two distinct elections (either actual disbursements or contracts to disburse with respect to a communication that was disseminated within the 48-hour or 24-hour period, see 2 U.S.C. § 434(g); 11 C.F.R. § 104.4(f)), then it would not file multiple “reports” but a *single* Schedule E “report” consisting of 20 pages that are identical in form but distinct in entries. Indeed, the Act and the Commission’s regulations explicitly make this distinction between a 48-hour or 24-hour “report” and the multiple, aggregating “independent expenditures” that comprise a “report.” See 52 U.S.C. § 30104(g); 11 C.F.R. §§ 104.4(f), 109.10. And, that is how the Commission identifies 48-hour and 24-hour reports on its website: each Schedule E filing, regardless of its length, appears as a single “48 Hour Independent Expenditure Report” or “24 Hour Independent Expenditure Report” – including the reports that were (and remain) posted on the 2012 Workers’ Voice segment of the Commission’s website. Accordingly, the reporting omissions at issue here concern not a number of unfiled “reports” but the nature and amounts of Workers’ Voice independent spending that the Commission alleges was not timely reported.

As Att. B plainly shows, almost every distinct Workers’ Voice expenditure that was not timely reported was one of several, and sometimes one of many, expenditures that occurred on the same date with respect to the same election – so, not every such expenditure itself would have prompted the filing of a new 48-hour or 24-hour report. We have not attempted to quantify this, but it is worth noting that 1,926 of the expenditures listed in Att. B – that is, 98.9% of them – pertained to the 48-hour reporting period, where the aggregate reporting threshold was \$10,000, and the average (mean) Workers’ Voice expenditure during that period that was not reported on the appropriate 48-hour report equaled \$253.74, or just 2.54% of the threshold.

C. The Monetary Independent Expenditures at Issue

Att. B reflects \$100,032.42 of monetary independent expenditures pertaining to eleven vendors to Workers’ Voice as not timely reported. We address each vendor in turn.

Independent expenditures involving two of these vendors (totaling \$22,987.50) in fact *were* timely reported:

- **Mission Control: \$15,487.50** *Door hangers in Nevada in presidential and Senate election*
This independent expenditure was timely reported on an October 15, 2012 48-hour report. On a subsequent Pre-General Report the date was changed to October 11, but our future review of the records reveals that this date change was an inadvertent error.
- **NGP VAN: \$7,500.00** *Telephone calls in presidential race*

Workers' Voice reported this independent expenditure on a 48-hour report on October 3, but the calls did not occur until October 11, so the amendment to the Pre-General Report corrected that date. Accordingly, this independent expenditure was timely reported.

Independent expenditures involving the following nine vendors (totaling \$77,084.92) were reported late, for the following reasons where known:

- **AFL-CIO: \$5,077.20** *Canvass packets, robocalls, and miscellaneous internet costs*
Miscellaneous items were late-accounted for reasons that cannot now be determined. The amount at issue comprised a miniscule portion of the \$2,181,741.26 of total Workers' Voice payments to the AFL-CIO during 2012.
- **Lexicon: \$1,311.62** *Layout of fliers*
Workers' Voice received an invoice after the fact and did not secure an estimate of the cost of services in advance. Workers' Voice paid Lexicon, and reported as independent expenditures, a total of \$5,009.12 during the 2012 general election.
- **Colleen O'Neill: \$415.90** *Proofreading of fliers*
Workers' Voice received an invoice after the fact and did not secure an estimate of the cost of services in advance. Workers' Voice paid O'Neill, and reported as independent expenditures, a total of \$2,236.66 during the 2012 general election.
- **Mosaic: \$17,581.25** *Production of fliers*
Workers' Voice is unable to determine exactly why this portion of the expenditures to Mosaic was untimely reported. Workers' Voice paid Mosaic, and reported as independent expenditures, a total of \$256,656.91 during the 2012 general election.
- **Extras Extras, Inc.: \$20,185.51** *Canvass operation in Nevada*
Workers' Voice sometimes received late information from this vendor about the daily costs of the canvass. Workers' Voice paid Extras Extras, and reported as independent expenditures, a total of \$312,100.00 during the 2012 general election.
- **Field Works: \$5,916.60** *Canvass operation in Virginia*
Workers' Voice filed 48-hour reports on the basis of an initial calculation about the daily canvass cost with respect to the federal candidates that were the subjects of the independent expenditures (Barack Obama, Mitt Romney and Timothy Kaine). A subsequent recalculation revealed that the daily costs in fact were higher. Workers' Voice paid Field Works, and reported as independent expenditures, a total of \$124,248.45 during the 2012 general election.

- **K&R Industries: \$694.00** *Production of lapel pins in presidential race*
Workers' Voice received a late invoice and did not estimate the cost in advance.
- **The Pivot Group: \$24,854.94** *Direct mail in Montana*
Workers' Voice engaged Pivot Group as a mail vendor in connection with independent expenditures in the U.S. Senate election. Workers' Voice received late invoices and did not estimate these costs in advance. Workers' Voice paid The Pivot Group, and reported as independent expenditures, a total of \$409,322.09 during the 2012 general election.
- **Harris Lithographics: \$1,047.90** *Flier production for Virginia*
Workers' Voice is unable to determine exactly why this portion of expenditures to Harris Lithographics was untimely reported. Workers' Voice paid Harris Lithographics, and reported as independent expenditures, a total of \$12,131.40 during the 2012 general election.

4. **Workers' Voice's Efforts to Improve Reporting During the 2013-2014 Cycle**

Although Workers' Voice believes that its contribution and expenditure tracking system during 2012 was largely accurate, in the wake of the problems that beset its reporting program in 2012, Workers' Voice decided early in 2013 to revamp its operations for the new election cycle. Workers' Voice proactively, and at considerable expense, devised and implemented a new system to collect the necessary information so as to file timely and accurate 48-hour, 24-hour and periodic reports with the Commission. Workers' Voice contracted with an experienced vendor to develop a computerized program for data collection purposes. In addition, AFL-CIO personnel at Workers' Voice's expense devoted significant time developing the new compliance program, both to prepare for the 2014 campaign season and to implement the program during 2014.

Under the new system, before an individual who is employed or otherwise paid by another organization begins to perform voter contact and other services for Workers' Voice, the in-kind contributing entity provides Workers' Voice written confirmation of the individual's salary, benefits and expense information so that Workers' Voice can determine the daily in-kind value of the individual's services. This information is input into the new database program. After the individual begins to provide services, Workers' Voice field staff nightly enter into the database the work performed by that individual. All voter contact literature and telephone scripts used by such in-kind staff are uploaded into the program. Workers' Voice headquarters compliance staff then allocate the costs related to the canvass or telephone activity between federal and non-federal candidates. An individual's other services for Workers' Voice are

attributed to administrative activities. Workers' Voice's headquarters compliance staff in Washington, DC maintain that data and report it as required.

Workers' Voice compliance and field staff were thoroughly trained on the new program, both at national trainings and in states where the Workers' Voice voter contact program took place. Additionally, organizations that contributed staff to Workers' Voice were informed about the new system and participated in demonstrations of it, and throughout 2014 they were in regular contact with the staff who operated the system.

In total, Workers' Voice spent over \$26,000 directly on the new program, paid for a new staff position at the AFL-CIO that was devoted to compliance support, and paid for substantial additional staff time to collect and report the necessary data (which Workers' Voice has not sought to quantify separately from its other administrative expenses). Also, three AFL-CIO employees who performed substantial compliance services for Workers' Voice during 2014 participated in FEC conferences on May 23 and November 13, 2013. And, in the fall of 2014 Workers' Voice retained another outside compliance firm to supplement the efforts of compliance staff housed at the AFL-CIO and Workers' Voice legal counsel with respect to Workers' Voice's reporting obligations.

5. This Matter Should be Referred to the Alternative Dispute Resolution Office

For the following reasons, we respectfully request that this matter be referred to the ADR Office for resolution.

First, no investigation is warranted. Workers' Voice acknowledges that it failed to timely include on 48-hour and 24-hour reports virtually all of the independent expenditures listed on Att. B. Indeed, Workers' Voice effectively acknowledged these omissions when it filed its 2012 October Quarterly, Pre-Election and Post-Election reports, as well as in its ensuing correspondence with RAD during 2013 about those reports. We have fully explained the circumstances involving Workers' Voice's efforts to timely comply with its reporting obligations during the 2012 general election period, and the problems that caused it to fall short with respect to a small portion of its reporting. And, despite the high number of late-reported expenditures, they are all repetitive of the same in-kind transactions with the same in-kind contributors in the same elections as were the 91.65% of Workers' Voice independent expenditures that are not at issue. This matter concerns data, all of which the Commission has, and not behavior and documents that can only be unearthed in an investigation. If any further information is needed or desired, Workers' Voice stands ready to provide it to the ADR Office during the negotiation of a settlement of this matter.

Second, the reporting errors were inadvertent and not knowing and willful. Workers' Voice devoted considerable effort during 2012 to tracking and reporting the complex information

that characterized its primarily in-kind system of resource acquisition and deployment. Again, this was a likely unprecedented data-gathering and reporting undertaking by a political committee in terms of its monetary scale, number of reportable transactions and geographic scope, and it was certainly new to Workers' Voice and the AFL-CIO staff whom Workers' Voice paid to manage its compliance with the Act's reporting requirements. And, Workers' Voice did not realize that a vendor system error failed fully to accommodate the statutory reporting thresholds – but even so, that flaw also produced more rapid reporting than the Act required once the initial reporting threshold for independent expenditures was reached in a particular election.

Third, as described above, Workers' Voice at its own initiative set out in 2013 to ensure that during the 2014 cycle the systemic data collection problems that occurred during 2012 would not be repeated, and to adopt a more reliable system. We believe these changes enabled marked improvements in Workers' Voice's reporting during 2014.

Finally, the Commission has used the ADR process to resolve similar kinds of Schedule E reporting violations, including where substantial spending was involved. For example, ADR recently settled with the Massachusetts Republican Party its failure to file 48-hour and 24-hour reports of \$629,026.10 of independent expenditures, see ADR 655 (April 22, 2014); with the National Republican Senatorial Committee its failure to file 48-hour reports to support independent expenditures totaling \$289,213.65, see ADR 694 (April 14, 2014); and with American Principles in Action for its failure to file 48-hour reports totaling \$74,496.50, see ADR 714 (July 18, 2014). See also, e.g., ADR 729 (Oct. 20, 2014) (Liberty for All Action Fund's failure to file a 24-hour report totaling \$42,085 later disclosed on a Monthly Report); ADR 495 and ADR 502 (March 9, 2010) (failure by Ciro Rodriguez for Congress to file 48-hour reports totaling \$75,200); ADR 488 (June 30, 2009) (Mississippi Republican Party's failure to file 24-hour reports totaling \$29,413.66); ADR 409 (Nov. 30, 2007) (Blue America PAC's failure to file 24-hour reports totaling \$25,005.84); ADR 322 (Sept. 26, 2006) (failure of International Association of Firefighters Interested in Registration and Education PAC to file 48-hour reports of independent expenditures totaling \$102,993.20 and 24-hour reports of independent expenditures totaling \$35,584.50).

Notably, three of these cases – ADR 655 (\$629,026.31), ADR 322 (\$138,577.70) and ADR 729 (\$42,085.00) – involved failures to report amounts of independent expenditures at any time before the applicable election that exceeded the \$35,390.05 that Workers' Voice failed to report at any time before the 2012 general election.

It is also common for the ADR Office in appropriate circumstances to resolve cases involving failures to timely report much greater sums of transactions other than independent expenditures than are at issue here. For example, the Massachusetts Republican Party case involved not only independent expenditures but failures to report receipts of \$60,279.50,

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disbursements of \$218,227.61 and debts of \$141,103.10. See ADR 655. The ADR Office also resolved the National Association of Realtors' failure to disclose receipts totaling \$1,065,000 and disbursements totaling \$134,854 during the 2012 election cycle. See ADR 671 (May 22, 2014). Similarly, the ADR Office resolved the failure of Maragos4NY to disclose receipts of \$794,086 and disbursements of \$800,000. See ADR 654 (Jan. 15, 2014). ADR 591 (Feb. 22, 2012) (Ohio Republican Party's failure to disclose debts totaling \$1,195,892). Other ADR cases have also dealt with substantial unreported transactions. See, e.g., ADR 676 (June 19, 2014) (American Bridge 21st Century's failure to disclose additional debts of \$360,061). And, in three of these cases – ADR 591 (\$1,195,892), ADR 655 (\$419,610.21) and ADR 671 (\$365,000) – the respondent committee's reporting failures deprived the general public of information about substantial financial transactions far in excess of Workers' Voice's \$35,390.05 until after an election was over.

Conclusion

Workers' Voice has sought to explain the circumstances of its 2012 reporting errors delineated in the Referral Letter, virtually all of which we acknowledge. For the reasons set forth above, we urge OGC to refer this matter to the ADR Office for an expeditious and appropriate resolution. Alternatively, we suggest initiation now of pre-probable cause conciliation.

Please let me know if we can provide any further information. Thank you for your consideration.

Yours truly,



Laurence E. Gold
Counsel to Workers' Voice

cc: Elizabeth H. Shuler, Treasurer